Supreme Court, U.S.
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NO. 91-1075

IN THE SUPREME COURT
OF
THE UNITED STATES OF AMERICA

OCTOBER TERM 1991

GEORGE LEWIS BAILES, JR.,
PETITIONER,
VS.
UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITIONER'S RESPONSE TO MEMORANDUM FOR THE UNITED STATES

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ORIGINAL QUESTION FOR REVIEW

WHETHER A CONGRESSIONAL STATUTE THAT IS SILENT AS TO CONGRESSIONAL INTENT FOR ITS RETROACTIVE APPLICATION SHOULD BE PRESUMED TO HAVE RETROACTIVE EFFECT.

NEW AND ADDITIONAL QUESTION FOR REVIEW RAISED BY THE UNITED STATES

WHETHER THE UNITED STATES' DECISION NOT TO PURSUE ITS CLAIM FOR RELIEF FOR "DOUBLE DAMAGES" CAUSES THE INSTANT CASE TO BE MOOT.

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STATEMENT OF FACTS

The statement of facts are contained within Petitioner's original petition. Petitioner reincorporates and adopts same as if fully set forth herein.

ARGUMENT

WHETHER THE UNITED STATES' DECISION NOT TO PURSUE ITS CLAIM FOR RELIEF FOR "DOUBLE DAMAGES" CAUSES THE INSTANT CASE TO BE MOOT.

The instant case and petition are not moot. Should the United States abandon all of its claims against the petitioner, then petitioner would certainly join with the respondent and agree that the case is moot. But the United States has not unambiguously abandoned all of its claims against the petitioner under the statute.

A. The United States has not clearly abandoned its claim for relief under the statute.

The United States sought and obtained relief in the District Court, not only for double damages, but for "costs relating to this action including but not limited to reasonable attorney and auditing fees." After entering a double damage award for the United States, the District Court directed that costs "other than taxable costs" would be determined later. (Pet. App. C-XXIII).

At this very moment there is still pending in the District Court a motion by the United States for Attorney's fees, which motion was filed after the Eleventh Circuit affirmed the District Court's opinion applying retroactively the statute in question. A copy of that motion is attached hereto. All that the United States has definitively abandoned is its claim for double damages: "The United States has determined not to pursue its claim for relief for double

damages under the new statute." (mem. for the United States, p.4).

There remains a live case and controversy over the award of attorney's fees and other costs and expenses, the claim for which is valid only if the statute in question is given retroactive effect. This issue, left unresolved by the United States' concession, is identical to the issue presented to the Court in Bradley v. School Board of Richmond, 416 US 696 (1974), a case that the Eleventh Circuit believes to be controlling on the issue of statutory retroactivity.

B. The United States has not disavowed the precedent that it set in the Eleventh Circuit.

The United States has done nothing to disavow the precedent that it has left in the Eleventh Circuit, and should the United States "discover" some "new" pre-statute violation of one of the petitioner's other apartment complexes, the Alabama District Court hearing the

case will be bound by the authority in the Eleventh Circuit that the United States may or may not be forsaking. In this import, the concession of the United States really does absolutely nothing to moot the controversy between the parties as to whether the statute does indeed apply retroactively.

Likewise, if upon remand the United States attempts to claim the advantages of the statute by claiming that the statute is merely an addendum to the regulatory agreement, the concession offered by the United States does nothing to moot the controversy between the parties. In brief in the Court below, the United States argued:

> Paragraph 14 of the regulatory agreements...is explicitly and purposely open-ended, permitting HUD to..."[a]pply to any court...for such other relief as may be appropriate...." ...[T]he Regulatory agreements give HUD the explicit right to seek any remedy against Bailes that will best effectuate the purposes of the program...."

(See appellate brief of the United States at p. 32.) And more pointedly, the United States

argued in that same brief: "But it is well established that all contracts with the government are subject to subsequent legislation by Congress." (see Id. at 35). A failure to resolve this issue in the instant petition will leave the United States "free to return to [its] old ways." United States v. W.T. Grant, 345 U.S. 629, 632 (1953).

C. The United States should be precluded from pursuing relief other than initially requested.

The Government's failure to take a cross petition from the decision of the Court below collaterally estops the government from initiating a new proceeding based on the same underlying dispute. The United States is seeking to avoid a final decision on the merits of two courts, decisions for which it successfully fought, only so it can go back to the District Court and litigate matters that should have been litigated initially.

Lastly, even if all claims and controversies between the parties regarding the statute were moot, the remand order proposed by the United States is indefensible. The government proposes that the District Court on remand be ordered to "allow the government to seek additional recovery pursuant to its other claims for relief," (Mem. for U.S., p. 4)., and be ordered to vacate only half of the judgment entered in the Court below. In all respects, that judgment would be final and never appealable.

Petitioner has expended substantial legal costs that such litigation entails defending this case, and the expense will have been needless in all respects. Your petitioner continues to have a clear and substantial financial interest in a determination that the 1988 Act cannot be applied retroactively, and continues to share an interest common to (most) all litigants that at some point, litigation come to an end.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the decision rendered by the United States Court of Appeals for the Eleventh Circuit.

RESPECTFULLY SUBMITTED,

ROY M. WEST
ATTORNEY OF RECORD

RALPH J. BOLEN, ESQ.,
ATTORNEY FOR PETITIONER

A P P E N D I X

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

UNITED STATES OF AMERICA, Plaintiff,	)
v.	) CIVIL) ACTION #) CV-89-P) 0794-S
PEPPERTREE APARTMENT, ET. AL, Defendant.	)

MOTION FOR ATTORNEY'S FEES AND COSTS

Comes now the United States of America, by and through its counsel, Frank W. Donaldson, United States Attorney, for the Northern District of Alabama, and Linda S. Trippe, Assistant United States Attorney, for this district, and moves the Court to enter an order granting to plaintiff the reasonable value of attorney time utilized in the prosecution of the above action and costs pursuant to 12

U.S.C. § 1715z-4a(c). A judgment affirming the district court's decision was entered September 30, 1991. Specifically, plaintiff requests reimbursement for 105.2 hours of attorney time utilized in the prosecution of this case at both the district court and appellate level at a rate of $75.00 per hour for a total of $7,890.00 plus $45.90 mileage. Plaintiff offers herewith the declaration of Geoffry L. Patton, Trial Attorney, Office of General Counsel, United States Department of Housing and Urban Development, Washington, D.C., and the affidavit of Robert P. Barclift, Assistant United States Attorney for the Northern District of Alabama, as Exhibits A and B to this motion.

Respectfully submitted,

FRANK W. DONALDSON

United States Attorney

LINDA S. TRIPPE